No. 7484

In the United States Circuit Court of Appeals for the Ninth Circuit

DAVID GORDON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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CITATIONS

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OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 9–11), which is unreported.

JURISDICTION

This case involves a deficiency in income taxes for the calendar year 1928 (R. 6). The Commissioner of Internal Revenue determined a deficiency in the amount of $2,614.50 (R. 6). The Board of Tax Appeals redetermined the deficiency and affirmed the Commissioner (R. 12). This appeal is taken from the decision of the Board of Tax Appeals, promulgated November 24, 1933 (R. 12).

The case is brought to this Court by a petition for review filed February 24, 1934 (R. 15), pursuant to Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

Taxpayer acquired personal property while he and his wife were domiciled in Quebec, Canada. Subsequently the property was sold and the proceeds invested in California. Did the taxpayer meet his burden of proof and show that one-half of income from the California investments was taxable to his wife by his own testimony of an informal oral agreement with his wife, made while they were domiciled in Canada, that they would share their property "fifty-fifty"?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra,* p. 11.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 9–10) are substantially as follows:

Taxpayer was born in the United States but when an infant moved, with his parents, to Canada where the parents became naturalized citizens. Taxpayer remained in Canada many years, and married there. At marriage taxpayer had no property or funds but his wife received $3,000 as a gift

from her parents. After marriage taxpayer and his wife agreed that everything was to be on a "fifty-fifty" basis. Taxpayer and his wife took the $3,000 and started a small manufacturing business in men's and women's clothing. The business prospered and was continued until about 1921, when taxpayer and his wife moved to California, bringing with them in excess of $200,000. This money was variously invested, much of it being lost before the taxable year. It is the income from such property that is in question for 1928.

Previous to 1928, taxpayer filed a joint return for himself and his wife. For 1928 they filed separate returns in which certain items of income were divided equally and other items unequally. Taxpayer's gross income is shown as $45,620.74 with a net income of $27,844.56, while Lillian Gordon, the wife, returned $21,901.41 as gross and $15,721.96 as net income.

SUMMARY OF ARGUMENT

If this case is to be decided under the community property law in the State of California, then the decision of the Board is correct and the entire amount of the income from the property was properly taxed to the taxpayer. This is true because the case, if governed by the community property law of California, is governed by that law as it existed prior to July 29, 1927, because the property was all acquired long prior to that date. Under

the law of California as it existed prior to that date, the wife had no present vested interest in the community estate and the title, dominion and control to and over the community property was so thoroughly vested in the husband that the income therefrom was taxable to him.

If the title to the property and hence the title to the income here in question is to be decided under the law of the Province of Ontario, Dominion of Canada, then the decision of the Board of Tax Appeals is correct and the entire income from the property was properly taxed to the taxpayer. This is true because the taxpayer failed to allege or prove the foreign law. Likewise, if the taxpayer relies upon the understanding or agreement with his wife made at the time that they were domiciled in Quebec, the decision of the Board of Tax Appeals is correct. The taxpayer failed to allege or prove that under the law of Quebec the alleged agreement or understanding was valid. The presumption of fact that the law of the foreign state is the same as the law of the forum invoked by the taxpayer is not applicable and even if the presumption were applicable it is only a presumption of fact and as such clashes with the presumption in favor of the correctness of the Commissioner's determination. Such being the case, the taxpayer would not be entitled to prevail on the mere basis of the presumption of fact.

ARGUMENT

I

Income is taxable to the husband under California law

In his petition (R. 2–4) the taxpayer states that the facts upon which he relies as a basis for the proceeding are as follows:

All of the property owned by petitioner was acquired subsequent to his marriage; that during the year 1928, and pursuant to amendment of the community property laws of the State of California, and pursuant to agreement between petitioner and his wife, he divided the community income; that if effect were given to the community property laws of the State of California and to the agreement between petitioner and his said wife, there would be no deficiency in the sum of $2,614.50, or any other sum.

Before considering the alleged agreement, we first invite the Court's attention to the legal situation presented by the contention in reference to the application of the community property law of California. When the taxpayer and his wife removed from Canada to California about 1921, he had in excess of $200,000 which was variously invested in California. It is the income from those investments that is now in question. It is clear that the income-producing property was all acquired prior to July 29, 1927. If we assume for the sake of argument that the property was community property

under the laws of California, the income was taxable to the taxpayer in its entirety. *United States* v. *Robbins,* 269 U. S. 315.

In the year 1927, the California legislature adopted an amendment to the Civil Code of California. The amendment became effective July 29, 1927, after being approved by the governor on April 28, 1927. The amendment, which is Section 161a of the Civil Code, reads as follows:

> 161a. The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the civil code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

On July 18, 1928, the Supreme Court of California held that Section 161a relates solely to property acquired after its effective date and does not in any manner relate to or govern the ownership of property acquired prior to July 29, 1927. *Stewart* v. *Stewart,* 204 Calif. 546, 555. See also *Sexton* v. *Daly,* 273 Pac. 109 (Calif.). It follows that this case is not governed by Section 161a of the Civil Code; and neither is it governed by the decision in *United States* v. *Malcolm,* 282 U. S. 792. That case was decided in reference to salary earned by the husband during the calendar year 1928; and it

merely held that such salary was community income, one-half of which was taxable to the wife under Section 161a.

II

Evidence does not show foreign law or validity of foreign agreement

The taxpayer contends that an oral agreement or understanding existed whereby he and his wife were to share everything they acquired after marriage on a "fifty-fifty" basis. This agreement or understanding was arrived at between the parties about the time of their marriage in the province of Quebec, Dominion of Canada. Is this evidence sufficient to show that title to one-half of the property acquired in Canada was in the taxpayer's wife at the time of their removal to California? The validity of the agreement must depend upon the law of Quebec. That law must be alleged and proved as any other fact in the case. "Foreign laws are well understood to be facts which must, like other facts, be proved to exist, before they can be received in a court of justice." *Church* v. *Hubbart,* 2 Cranch 187, 235. "* * * the existence of a foreign law, written or unwritten, cannot be judicially noticed, unless it be proved as a fact, by appropriate evidence." *Ennis* v. *Smith,* 14 How. 399, 425.[1] This rule applies to the Board of Tax Appeals. *Columbian Carbon Co.* v. *Commissioner,*

[1] This case sets forth in detail the approved manner of proving foreign laws (pp. 425–429).

25 B. T. A. 456; *Burns* v. *Commissioner,* 12 B. T. A. 1209, 1224. See Section 601 of the Revenue Act of 1928, *infra;* Rule No. 39 of the Board of Tax Appeals, *infra; Winter* v. *Latour, 35 App.* D. C. 415.

The taxpayer failed to offer any proof whatsoever of the law of Quebec. We respectfully submit that the Board of Tax Appeals correctly stated (R. 11):

> Petitioner failed either to plead or prove the pertinent law of Canada respecting title to property. We can not assume it or take judicial notice of the same. Nor is quotation of such laws in the brief sufficient. The record fails to show that community property obtains in Canada, that it may be superseded by agreement of the parties, or even that husband and wife are free to contract with each other with respect to property. We are left in entire ignorance of the status or ownership of property in Canada.

The taxpayer has assigned as error the failure of the Board to presume that the community property law of California is the same as the community property law of Quebec; and that the law of Quebec relating to the validity of contracts is the same as the corresponding law of California. In the first place, the taxpayer has misconceived the presumption of fact which he seeks to apply. In *Cuba R. R. Co.* v. *Crosby,* 222 U. S. 473, Mr. Justice Holmes, speaking for the Court, said (p. 479):

> Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different system prevails obviously the limits must be narrower still.

There is no room for the presumption of fact in this case. The community property law of California comes from the Spanish law. *United States* v. *Robbins, supra.* We know in a general way that the background of law and custom in the province of Quebec is French.

In the second place, the taxpayer asks this Court to indulge the presumption of fact and then asks the Court to hold that that presumption of fact overcomes the presumption in favor of the correctness of the determination of the Commisionser. Obviously the presumption of fact cannot be indulged in view of the Commissioner's determination and especially in view of the fact that the taxpayer had full opportunity before the Board of Tax Appeals to rebut that presumption with actual proof. Even if the presumption were indulged the taxpayer could not prevail. The two presumptions would

merely cancel each other and would leave the parties where they were in the beginning of these proceedings, i. e., with the deficiency determined against the taxpayer.

In the third place, if the presumption were indulged to aid in the establishing of the validity of the agreement or understanding the taxpayer would nevertheless fail. The agreement reflected in the testimony is nothing more than a very general understanding. Under the decisions of this Court it is not sufficient to render one-half of the income taxable to the wife. *Pedder* v. *Commissioner*, 60 F. (2d) 866 (C. C. A. 9th).

CONCLUSION

The decision of the Board of Tax Appeals is clearly correct and should be affirmed.

Respectfully submitted.

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JANUARY 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 601. BOARD OF TAX APPEALS PROCEDURE.

Sections 906 and 907 (a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows:

* * * * *

"SEC. 907. (a) * * * The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. * * *"

* * * * *

Rule No. 39 of the Board of Tax Appeals:

RULE 39. *Evidence.*—The rules of evidence applicable in courts of equity of the District of Columbia shall govern the admission or exclusion of evidence before the Board or any of its Divisions.

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